Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98

To: The Commission

COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS, INC.

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Time Warner Communications Holdings, Inc
CC Docket No. 96-98
Initial Comments
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TABLE OF CONTENTS

SUMMARY

Time Warner Communications Holdings, Inc. ("TW Comm") provides local exchange and exchange access service in Rochester, New York, and New York City, will soon provide service in Ohio and Texas, and has begun negotiations to provide service in a variety of other states. TW Comm is committed to making the significant investments necessary to construct and operate state-of-the-art local telecommunications networks in competition with incumbent local exchange carriers ("ILECs"), and believes that the rules established by the Commission in this proceeding will be critical in fulfilling Congress's vision of bringing true competition to the local exchange marketplace.

TW Comm has been guided by several public policy objectives in formulating its comments in this proceeding. First, the Telecommunications Act of 1996 ("1996 Act") clearly reflects Congressional intent that competition in telecommunications services at all levels, including local service, is a national policy. Therefore, in discharging its statutory responsibility for implementing the specific provisions of the 1996 Act, the Commission should establish nationally uniform rules to ensure that competition is permitted to develop in a cohesive manner.

Second, TW Comm urges the Commission to recognize Congressional intent that for local competition to be meaningful, services must be provided over separate and competing network facilities -- simply reselling or repackaging ILEC facilities and services will not be true competition. Accordingly, the rules promulgated by the Commission must create incentives for the development of competing networks, and must not improperly stimulate market entry and expansion through resale by bestowing artificial costing or other advantages on resellers. Third,

despite provisions contained in the 1996 Act designed to neutralize anticompetitive behavior, ILECs still have the ability and the incentive to delay the entry of competing local exchange carriers. Thus, Commission's rules should include appropriate complaint procedures -- and penalties -- for those circumstances in which ILECs attempt to impede or forestall competition.

Consistent with each of these overriding policy objectives, and as explained in detail in its comments, TW Comm submits that:

* Sections 251 and 252 of the Act are intended to apply to all aspects of local interconnection, access to unbundled network elements, and resale of ILEC services, and regulations implementing those statutory requirements should not be limited to the interstate jurisdiction.

* The Commission should adopt a bifurcated procedure for resolution of complaints alleging violations of Section 251 and 252, with both the Commission and the states playing an active and important role.

* The Commission should create a regulatory framework which will assist ILECs and requesting telecommunications carriers in reaching agreements through voluntary negotiations, including the adoption of specific national guidelines regarding what constitutes "good faith" for purposes of Section 251(c) negotiations.

* The Commission should adopt a "fresh look" period during which either a requesting telecommunications carrier or an ILEC may ask the other party to renegotiate all or portions of interconnection agreements which predate the 1996 Act.

* Any point in the ILEC network should be presumptively a technically feasible point of interconnection and an ILEC claiming a point not to be feasible should bear the burden of proof.

* All agreements entered into pursuant to Sections 251 and 252 should be required to include performance standards and penalties for failure to adhere to such standards. The pro-competitive goals of the 1996 Act necessitate that ILECs be subject to rigorous provisioning standards, even if those standards are more aggressive than those which ILECs impose upon themselves.

* Absent technical infeasibility or space limitations, the physical collocation of interconnector-owned equipment must

occur at the ILECs' central offices. However, nothing in the 1996 Act precludes other forms of interconnection if mutually agreed to by the parties.

* The Commission should reaffirm its original rules governing mandatory physical collocation as part of its national standards. The Commission should also reaffirm a modified version of its earlier virtual collocation rules.

* The Commission should not attempt to formulate an exhaustive or static list of network elements, but should adopt an approach to network unbundling which affords negotiating parties maximum flexibility.

* The Commission has the authority, and the obligation, to adopt nationally uniform rules in establishing a just, reasonable, and nondiscriminatory pricing scheme.

* Pricing should distinguish between those elements that are available only from the ILEC (*e.g.*, interconnection, collocation, unbundled loops, etc.) and those that can be duplicated by competitors or are readily available from other sources (*e.g.*, switching, transport, other databases).

* Proxy-based approaches to establishing pricing is inappropriate.

* Interconnection pricing rules should not allow flat rate pricing for the unbundled switching element.

* The interconnection and unbundled network elements requirements are not applicable to telecommunications carriers for use in the provision of interexchange services.

* The 1996 Act's resale requirements applicable to ILECs should not be construed in a manner as to require inefficient market entry through resale, or to discourage investment in competing facilities-based local telecommunications networks.

* The Commission may, and should, impose a "bill-and-keep" reciprocal compensation mechanism for the transport and termination of telecommunications traffic.

* The Commission should be prepared to intercede in circumstances where states fail to meet their responsibilities under Section 252 and establish rules to ensure expedited determinations of whether preemption is required.

* The Commission should adopt national standards for arbitration to be used as guidelines by state commissions and by the Commission in preemption situations.

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To: The Commission

COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS, INC.

Time Warner Communications Holdings, Inc. ("TW Comm"),[1] by its attorneys, hereby submits its initial comments on the Commission's notice of proposed rulemaking in the above-captioned proceeding.

I. INTRODUCTION

TW Comm is a provider of local telecommunications services in communities throughout the United States. It provides service in Rochester, New York, and New York City, is soon to initiate service in Ohio and Texas, and has begun negotiations in Florida, Tennessee, North Carolina, California and Indiana. TW Comm's services include local exchange telecommunications service, as well as exchange access service. The TW Comm business plan contemplates that it will provide these and other services utilizing its own telecommunications network facilities. TW Comm is committed to making the significant investments necessary to construct and

[1]TW Comm is a wholly-owned subsidiary of Time Warner Entertainment Company, L.P.

operate state-of-the-art local telecommunications networks. In short, TW Comm will be a facilities-based provider of local telecommunications services, in competition with incumbent local exchange carriers (ILECs) as well as other service providers.

In these comments, TW Comm will address many of the issues raised by the Federal Communications Commission ("Commission") in its Notice of Proposed Rulemaking ("Notice").[2] In studying the issues set forth in the Notice and in developing positions on those specific issues, TW Comm has been guided by several public policy objectives which it offers for the Commission's consideration in this proceeding.

First, the Telecommunications Act of 1996 ("1996 Act")[3] reflects a clear Congressional mandate that telecommunications service competition at all levels, including local service, is national telecommunications policy. In crafting the Act, Congress sought to ensure that the opportunity for competitive telecommunications markets, including local service markets, would develop throughout the United States.[4] Therefore, in promulgating

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[2]Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Notice of Proposed Rulemaking*, FCC 96-182, released April 19, 1996 (hereinafter "NPRM" or "Notice").

[3]Pub. L. No. 104-104, 110 Stat. 56.

[4]As the Commission acknowledged in the Notice, "Congress intended the Commission to implement a pro-competitive, deregulatory national policy framework envisioned by the 1996 Act." Notice at ¶26. (emphasis added.)

regulations to implement the local competition provisions of the 1996 Act, the Commission should remain mindful that it is its responsibility to establish national rules which impose specific baseline requirements on telecommunications providers throughout the nation and which mandate that all of the states perform their responsibilities in advancing that national policy in a consistent manner.

Such nationally uniform rules will be necessary to ensure that local competition is permitted to develop in a cohesive manner throughout the nation, and that the advancement of such competition is not impeded by the balkanization of telecommunications markets which could occur if the states were left to establish differing operating rules and policies governing local service competition.

Second, TW Comm urges the Commission to recognize Congress's intent that for local competition to be meaningful, services must be provided over separate and competing network facilities.[5] Competition which is limited to the reselling or repackaging of ILEC facilities and services will not be true competition. Although resale will play an important role in enabling new entrants to introduce their services and to expand their markets while constructing their own networks, resale is not, and never has been, an effective means for development of long-term competitive

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[5]See, *e.g.*, H.R. Conf. Report No. 458, 104th Cong., 2d Sess. 1 (1996) ("Joint Explanatory Statement") at 147-148.

alternatives. Accordingly, the rules promulgated in this proceeding must create incentives for development of competing networks, and must not improperly stimulate market entry and expansion through resale by bestowing artificial costing or other advantages on resale.

Third, the Commission's several decades of encouraging competition in telecommunications market segments that had historically been regulated monopoly markets has certainly shown that incumbent monopolists have incentives to forestall competitive entry. They act on those incentives by engaging in such dilatory tactics as failing to negotiate with their competitors, using the regulatory processes (at both the federal and state levels) to limit opportunities for market entry, and by pricing essential services in a manner which makes those services unavailable to competitors or at least uneconomic for competitors to use. Therefore, the rules adopted herein should be designed to enable ready detection of such tactics and to equip the states and the Commission with the requisite authority to prevent the use of such tactics.

The 1996 Act reflects Congressional intent to neutralize those incentives by providing incentives to ILECs not to use their monopoly power to impede or forestall competition. The regulatory flexibility provisions of the Act (*e.g.*, Section 10 which authorizes the Commission to engage in regulatory forbearance)

applicable to all LECs (as well as other telecommunications carriers), and the in-region interLATA service opportunity for Bell Operating Companies ("BOCs") created by Section 271 of the Act are examples of such "carrots" contained in the Act. At the same time, the Commission must remain mindful that ILEC incentives to preclude meaningful competition will continue to exist, and therefore, the Commission's rules should include appropriate "sticks" in the form of complaint procedures and sanctions to be imposed in those circumstances where ILECs elect to act on those anticompetitive incentives.

In order to assist the Commission and its staff in reviewing these comments and in formulating regulations within the narrow time constraints imposed by the 1996 Act,[6] TW Comm will address the issues set forth in the Notice in the order that they are discussed in the Notice.

I. PROVISIONS OF SECTION 251

A. Regulations Implementing Section 251 Should Be National In Scope

At ¶¶25-40 of the Notice, the Commission asks a series of questions regarding the scope of the regulations to be promulgated to implement Section 251. TW Comm concurs with the Commission's

[6]Section 251(d) of the 1996 Act requires the Commission to have promulgated regulations implementing these sections of the Act within six months of enactment, *i.e.*, by August 8, 1996.

tentative conclusion that Sections 251 and 252 of the Act are intended to apply to all aspects of local interconnection, access to unbundled network elements, and resale of ILEC services, and that regulations implementing those statutory requirements should not be limited to the interstate aspects of interconnection, network elements, and resale. The 1996 Act in general, and Sections 251 and 252 in particular, articulate a clear and unequivocal mandate in favor of competitive telecommunications markets, including local service markets. Nothing in the 1996 Act or its legislative history indicates any intent by Congress to limit the Commission's authority to establish such regulations as appropriate to govern the terms of local interconnection, access to unbundled network elements, resale, and the agreements applicable thereto, to the interstate portions of those facilities and services. In fact, Section 251(d)(1) of the Act specifically directs the Commission to establish regulations to implement the requirements of Section 251.

Neither Section 2(b) nor Section 221(b) of the Communications Act of 1934, as amended, ("the Act")[7] limit the Commission's authority to adopt comprehensive national rules in order to ensure that the statutory requirements of the 1996 Act are implemented in a nationally uniform manner. Section 2(b) denies the Commission jurisdiction over wholly intrastate service. Section 221(b) limits

[7]47 U.S.C. §152(b) and §221(b).

the Commission's jurisdiction over telephone exchange service, even where portions of such service constitute interstate communication, in cases where those services are subject to state or local regulation. However, those provisions, enacted long before the 1996 Act, may not be interpreted in a manner which limits the Commission's authority to promote the goals and requirements of the 1996 Act. Had Congress sought to limit the scope of the 1996 Act to interstate and foreign services, and to restrict the Commission's authority to promulgate implementing regulations to interstate and foreign services, it would have so stated. It did not do so. Rather, the language of the 1996 Act is inclusive in that it applies to all telecommunications services -- intrastate as well as interstate. Moreover, the fact that the statute imposes obligations that are specifically applicable to telephone exchange and exchange access service,[8] without regard to whether those services are interstate or intrastate, indicates that the scope of the 1996 Act extends to the provision of such services irrespective of whether they are interstate or intrastate services. To the extent that Section 2(b) or 221(b) can be read to limit the Commission's authority over intrastate or local exchange service, those limitations have been superseded by the provisions of the

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[8] See, *e.g.*, Section 251(c)(2)(A) which requires ILECs to provide for the facilities and equipment of any requesting telecommunications carrier interconnection with the local exchange carrier's network "for the transmission and routing of telephone exchange and exchange access."

1996 Act.[9]

In addition to the Commission's legal authority to promulgate uniform implementing regulations which are national in scope, nationally uniform baseline regulations implementing Section 251 and 252 are necessary as a matter of sound public policy.[10] Absent a comprehensive, nationally consistent set of baseline regulations governing such important matters as interconnection of local networks, access to network elements, resale of local services, pricing of those facilities and services, and arbitration procedures for local interconnection agreements, a range of inconsistent state requirements is likely to develop. Existing competitors and new entrants will be required to configure their networks differently and to operate differently in the various states in which they provide service. It might even become necessary for service providers to provision interstate services

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[9]TW Comm agrees with the Commission's conclusion at ¶40 of the Notice that nothing in the 1996 Act alters the division of jurisdictional authority set forth in the Communications Act with respect to matters falling outside the provisions of the 1996 Act. For example, local telephone exchange service rates remain subject to applicable state laws and regulatory requirements. Indeed, Section 253(b) of the 1996 Act specifically acknowledges the states' authority to impose on a competitively neutral basis requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers.

[10]This does not imply that state laws and regulations cannot differ from each other, so long as national standards are being met, consistent with Section 251(d)(3).

(*e.g.*, interstate exchange access) differently from intrastate services (*e.g.*, intrastate exchange access, telephone exchange service). Further, as the Commission has recognized in the Notice, many states have not yet established rules governing local competition, or even commenced proceedings to adopt such rules.[11]

Moreover, in the absence of comprehensive national requirements governing interconnection between ILECs and their competitors, ILECs will retain the incentive and ability to forestall competitive entry by playing federal and state regulatory proceedings and requirements against each other. Such tactics consume time, personnel and other resources of new entrants whose resources are far more limited than the ILECs'. Therefore, an unfortunate result of a Commission election not to establish comprehensive regulations could be to delay the advent of meaningful local telecommunications services competition for years, in clear contravention of Congress's intent in enacting the 1996 Act.

TW Comm's concerns about regulatory delay in specific states are not merely theoretical. TW Comm already has experienced such delay firsthand in the development of local competition rules in the state of Ohio. Although TW Comm became authorized by the Public Utilities Commission of Ohio to provide local telecommunications service in August 1995, no comprehensive rules

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[11] Notice at ¶28, n. 43.

governing local competition and interconnection in Ohio have yet been adopted. That authorization is conditioned upon such rules being issued and interconnection being obtained. Under the terms of the certificate, TW Comm may not commence service until those conditions are satisfied. TW Comm entered into negotiations with Ameritech Ohio -- the dominant ILEC in Ohio, in December 1994 -- seventeen months ago. Since that time, the Ohio Commission has held workshops, conducted hearings, and even issued interim interconnection and compensation requirements. However, it has not yet adopted permanent rules, and it might not do so until 1997 or later. TW Comm raises the Ohio situation in these comments not to criticize the Ohio Commission which has worked tirelessly to promote negotiations between TW Comm and a very reluctant Ameritech, but rather to demonstrate that there may be significant differences between the states with respect to the development of local competition rules and policies. In TW Comm's opinion, it would undermine the objectives of the 1996 Act for local competition in any state to be delayed pending state establishment of rules and policies governing such competition.

B. Enforcement Of Sections 251 And 252 And The Regulations Adopted To Implement Those Sections Of The Act Ultimately Is The Commission's Responsibility

The Commission invites comment on the relationship between Sections 251 and 252 of the Act and the Commission's complaint

authority under Section 208.[12] Section 208 authorizes the Commission to adjudicate complaints against common carriers for violations of provisions of the Act. Unquestionably, "the Act," for purposes of Section 208 complaint jurisdiction, includes the entirety of the Communications Act of 1934, as amended by the 1996 Act. Thus, complaints alleging violations of Sections 251 and 252 are within the Commission's Section 208 authority.

However, pursuant to Section 252(e), interconnection agreements between ILECs and other telecommunications carriers are subject to approval by state commissions. It therefore may be appropriate that such agreements also be subject to interpretation and enforcement by the same state agencies which approved the agreements and which, in some cases, presided over the arbitration proceedings which resulted in those agreements. Thus, the states should have a role in the enforcement of those agreements notwithstanding the fact that the agreements have their origins in sections of the Communications Act.

In determining how those agreements should be enforced and whether enforcement is properly a federal or a state responsibility, the Commission should remain mindful of the fact that Section 208(b) has been amended to reduce to five months the period within which the Commission must adjudicate and resolve Section 208 complaints. TW Comm recognizes that the statutory

[12] Notice at ¶41.

reduction in complaint resolution time mandated by the 1996 Act will place considerable pressure on the Commission's complaint procedures and will burden the Commission's resources available for complaint enforcement.

In order to accommodate the conflicting jurisdictional bases for enforcement of interconnection agreements as well as to reduce the demand on Commission enforcement resources, TW Comm suggests a bifurcated procedure for resolution of complaints alleging violations of Sections 251 and 252 and interconnection arrangements implemented thereunder. Specifically, TW Comm recommends that parties wishing to bring Section 208 complaints alleging violations of Section 251 and/or 252 be required to attempt to negotiate resolution of the matters in dispute and that they subject the matter in dispute to mediation before the state commission which had approved the agreement as a condition precedent to filing a Section 208 complaint with the Commission. Further, parties filing such complaints with the Commission should be required to certify in their complaints that they have attempted to utilize state mediation procedures without resolution, or that the state commission has refused to mediate the dispute or complaint. To ensure that state commissions are afforded a fair opportunity to resolve interconnection disputes and to prevent the state mediation requirement from imposing undue delay on a party's right to avail itself of the Section 208 complaint procedure, TW Comm recommends

that parties be required to wait at least thirty days following a request for state mediation of an interconnection agreement dispute before filing a Section 298 complaint with the Commission.[13]

C. Obligations Imposed By Section 251(c) On "Incumbent LECs"

In TW Comm's opinion, no provision of the 1996 Act will be more central to the advent of local telecommunications competition than the requirements imposed upon ILECs by Section 251(c). In adopting those requirements, Congress recognized that ILECs continue to enjoy monopoly power within their local exchanges, that they retain bottleneck control of those essential network facilities, and that competition cannot occur within those exchanges unless and until competitors are allowed to access ILECs' networks. Therefore, the obligations imposed on ILECs are in many respects the centerpiece of the local telecommunications provisions of the 1996 Act.

Before seeking comment on specific aspects of those ILEC requirements, the Commission asks whether it should establish standards for subjecting other LECs to ILEC obligations pursuant to

[13]Section 207 of the Act allows persons claiming to have been damaged by common carriers by conduct in violation of the provisions of the Act either to make complaint to the Commission or to bring suit in any district court of the United States of competent jurisdiction. Nothing in the 1996 Act limits that right or excludes complaints alleging violation of Section 251 and 252 from being brought either before the Commission or in federal court.

Section 251(h)(2) and whether states should be allowed to impose the statutory ILEC obligations on others.[14] With respect to the first question, the language in Section 251(h)(2) that authorizes the Commission to subject other LECs to ILEC obligations under certain conditions is permissive in nature. TW Comm submits there is no basis at this point in time for the Commission to exercise its discretion to establish standards and procedures by which interested parties could seek to demonstrate that a particular LEC should be treated as an ILEC. The Commission should not view Section 251(h)(2) as an invitation to regulate in the absence of a problem. That section will allow the Commission to establish the permissible standards and procedures if the local exchange marketplace develops in such a manner that other LECs begin to take on the characteristics of an ILEC. Section 251(h)(2) is forward-looking in that it authorizes the Commission to act if, in its discretion, the marketplace has developed in a manner that warrants such action. At this point in time, however, there is no reason to impose ILEC requirements on other LECs and the establishment of standards and procedures by which interested parties could seek to do so will only encourage such parties to seek the imposition of ILEC designation as a negotiating tool.

Section 251(b) establishes certain requirements for all LECs. Those requirements include resale, number portability, dialing

[14] Notice at ¶¶44-45.

parity, access to rights-of-way, and reciprocal compensation. By establishing one set of obligations for all LECs and a separate, more extensive set of obligations for ILECs, Congress acknowledged that the unique status of ILECs as incumbent monopolists warrants special obligations.

With respect to whether state commissions should be allowed to impose ILEC obligations on other LECs, there is no language in the 1996 Act that would authorize state commissions to do so. The fact that the 1996 Act authorizes the Commission to take discretionary action in this area but does not so authorize state commissions, clearly indicates that Congress did not intend for state commissions to have the authority to impose ILEC obligations under other LECs. Moreover, there would be no purpose to allowing individual states to substitute their judgment for that of Congress regarding the respective obligations applicable to LECs and ILECs.

1. Duty To Negotiate In Good Faith

a. The Commission Should Establish National Guidelines Governing Good Faith Negotiations

The statutory scheme embodied in Sections 251 and 252 of the Act establishes "good faith" negotiations between ILECs and requesting telecommunications carriers as the first -- and preferred -- method of having the parties enter agreements on the terms and conditions of the obligations imposed on ILECs pursuant

to Section 251(c).[15] In the event that parties are unable to negotiate agreements voluntarily, Section 252 provides a mechanism for arbitration under the auspices of state commissions. However, avoiding arbitration by successfully concluding voluntary negotiations will conserve valuable state commission resources, be less costly to the parties, and result in the more rapid development of competing services. Accordingly, the Commission should make every effort to create a regulatory framework which will assist ILECs and requesting telecommunications carriers in reaching agreements through voluntary negotiations.

In order to achieve this goal, TW Comm urges the Commission to adopt specific national guidelines regarding what constitutes "good faith" for the purposes of Section 251(c)(1) negotiations. However, even with clear national negotiation standards, incumbent LEC monopolists still will have the ability and the incentive to delay the onset of competition. Thus, the Commission should also establish penalties for failure to comply with such standards.[16] The duty to negotiate in good faith requires that the ILEC

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[15]See S. Rep. No. 23, 104th Cong., 1st Sess. (1995) at 19 ("The Committee intends to encourage private negotiation of interconnection agreements.").

[16]National standards for good faith negotiations will be necessary to ensure that states are not free to condone or ignore ILEC negotiating tactics which violate the statutory requirement of good faith. In the absence of national standards, such ILEC negotiating tactics could become insulated from antitrust liability under the state action doctrine. See Parker v. Brown, 317 U.S. 307 (1942).

participate affirmatively, contributing substantively and constructively to move the negotiations along towards a successful and expeditious conclusion. The ILEC cannot remain passive and reactive. The duty also requires that the ILEC not employ any bad faith negotiating tactics that would undermine the progress of the negotiations. In developing national guidelines, the Commission should address both the ILECs' affirmative obligation, *i.e.*, to negotiate in good faith, as well as their negative obligation, *i.e.*, not to negotiate in bad faith.

Determinations of whether a party has failed to negotiate in good faith will typically be fact-specific. However, the benefits of national guidelines, discussed in the introduction of these comments, are particularly applicable in this context. The Commission has noted that, during "interconnection negotiations, a carrier may exhibit anticompetitive conduct by causing delays in the negotiating process, which in turn would delay service to the other party's customers and place them at a competitive disadvantage...."[17] Based on first-hand experience in attempting to negotiate the terms and conditions of interconnection with various ILECs, TW Comm believes that Commission guidance in this area will go a long way toward avoiding potential negotiation

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[17]In the Matter of the Need to Promote Competition and Efficient Use of Spectrum For Radio Common Carrier Services, *Memorandum Opinion And Order On Reconsideration*, 66 RR 2d 105 (1989) ("Cellular Interconnection Reconsideration Order") at ¶16.